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No. 91-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHOLETTE M. BRUNO,

Petitioner,

v.

CITY OF CROWN POINT, INDIANA, and GEORGE W. PYLE, JR., individually and in his capacity as Chief of Crown Point Emergency Medical Service,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, City of Crown Point, Indiana and George W. Pyle, Jr., individually and in his capacity as Chief of Crown Point Emergency Medical Service, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 950 F.2d 355 (7th Cir. 1991).

STATEMENT OF THE CASE

Respondents, City of Crown Point, Indiana and George W. Pyle, Jr., submit that the opinion of the Seventh Circuit Court of Appeals below sets forth a comprehensive statement of the case and incorporate those facts herein. In addition to petitioner's statement of the case, respondents call this Court's attention to the following additional facts and circumstances.

Because the paramedic position involved 48 hours scheduling, George Pyle, the interviewer, was concerned with potential hardship on the family (tr. 191-201). Pyle experienced stress firsthand when he worked the 48 hour schedule while his wife was employed full time with small children at home (tr. 191-201). Pyle discussed family with male applicants and noted a male applicant's wife worked as a nurse at St. Anthony's Hospital (tr. 212-13).

In the application process, the applicants (six males and one female) were ranked in order of qualifications (tr. 31-35). Bruno was not in first place and ranked second or third having qualifications similar to another male applicant (tr. 34-35).

REASON WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION OF THE 7TH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY PRECEDENT ESTABLISHED BY THIS COURT OR ANY OTHER OPINION CITED BY PETITIONER.

No new rule of law or constitutional principle was decided by the 7th Circuit Court of Appeals opinion in this case. A review of the opinion below clearly demonstrates that the case turned on its own facts and the evidence produced in the trial court (appendix pp. 1-17). The court below specifically noted that its finding in this case was based upon its review of the trial record.

> Our exam doesn't persuade us that substantial evidence supports a finding of intentional discrimination under either path. (Appendix p. 10).[1]

Petitioner summarily asserts that the court below contradicted, altered or reached a result which is legally inconsistent with this Court's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989) without reference or citation to the opinion below, which carefully and deliberately analyzed the trial evidence while applying the principles enunciated by this Court in *Price Waterhouse* (appendix pp. 10-13).

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[1] In referencing either path the court was referring to the direct proof of discrimination under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and the indirect method using the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting method of proof (appendix pp. 9-10).

Petitioner's framing of the issue falls short of identifying the bases of the judgment of the court below. The opinion below, in accord with *Price Waterhouse*, consistently held that merely showing that questions were asked in an interview is not sufficient to prove intentional discrimination and required Bruno to show that the employer actually relied on her gender in making its decision (appendix p. 11). *Price Waterhouse*, 490 U.S. 228 at 251.

Petitioner does not dispute the legitimacy of the requirement that she must establish that the employer actually relied on her gender in making its decision and, in fact, cites this critical portion of this Court's opinion in *Price Waterhouse* in her petition (petition p. 8). Petitioner fails to address the dispositive finding of the court below; the evidence in the record does not establish that Pyle relied on sex stereotypes (appendix p. 12). Petitioner does not contest this finding, nor does she identify any evidence to support such a finding of reliance on sex stereotypes in the record. The failure to produce evidence of reliance on sex stereotypes is fatal to petitioner's claim under this Court's holding in *Price Waterhouse*, which was correctly applied by the lower court opinion.

The opinion below is in complete accord with *Price Waterhouse* and it was the insufficiency of evidence required under *Price Waterhouse* which caused the result which plaintiff appeals from.

The court below correctly concluded that in the absence of evidence that the employer actually relied on Bruno's gender in making its decision, no direct proof of discrimination has been established (appendix pp. 11-13). The aforementioned statement is an accurate statement of the law as set forth by this Court in *Price Waterhouse* and petitioner does not contend otherwise. The lower court did

not misapply the law, nor misconstrue the holding in *Price Waterhouse*. It simply found on the trial court record that there was no evidence to establish that the employer relied on Bruno's gender in making his decision. The petitioner in this case wholly fails to identify what evidence existed to establish that Pyle relied on Bruno's gender in making his decision. As such, the petitioner has wholly failed to identify any criteria or justification to warrant further review of this matter before this Court.

Alternatively, petitioner attempts to persuade this Court that the opinion of the lower court is irreconcilable with court of appeals decisions, including precedent established by the court below. Petitioner's reliance on the direct evidence cases cited in the petition is misplaced. Here again, petitioner glosses over the requirement that petitioner must prove that sex stereotyped questions relate to the specific employment decision in question. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989). It is proof of a relationship between sex stereotyped questions and the specific employment decision in this case that is utterly devoid in the record below.

Direct evidence is that proof, which, if believed by the trier of fact, proves the existence of a fact without resort to inference or presumption. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 at 569 (7th Cir. 1989). There must be a nexus between the statements relied upon by the plaintiff and the employment decision which will demonstrate that the illegitimate criteria was a substantial factor in the hiring decision. *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989).

Petitioner points to no evidence to establish a nexus between her interview discussions with Pyle and his decision to hire another.

Cases relied upon by petitioner are readily distinguishable in significant factual details. In *Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990), one of the plaintiff's interviewers indicated directly that he would not consider "some woman" for the position in question. Similarly, in *Burns v. Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990), the decision making official stated that no woman should be named to any position similar to the one in question. 908 F.2d 1512 at 1518. Additionally, in *Caban-Wheeler v. Elsea*, 904 F.2d 1549 (11th Cir. 1990), the decision maker specifically told the applicant that the position in question required a black person. 904 F.2d 1549 at 1555. Another case cited by petitioner containing direct statements of discriminatory intent is *EEOC v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990), where the general manager of defendant's manufacturing facilities stated that he wouldn't hire any black people. The petitioner's reliance upon the aforementioned cases is misplaced. In each of the cases relied upon by petitioner, the racial and sexual epithets and derogatory comments themselves evidenced intent to discriminate and, in fact, proved the actual reliance upon gender or race in making the employment decision through the character of the comments themselves. In contrast, no such direct or blatant discriminatory statement was made by the respondent. In fact, no statement was made by the respondent which evidenced any intent to exclude women from consideration for the position. The trial evidence revealed quite certainly that Ms. Bruno was considered for the position in question. The cases cited by petitioner are inapposite to this case and are neither in conflict with, nor disturbed by the opinion below. Petitioner has provided this Court with no reason to interfere with the judgment below as it was correct and consistent with the law as established by this Court in *Price Waterhouse*.

The lower court also considered petitioner's alternative contention to the direct evidence—*Price Waterhouse* approach and analyzed the evidence from the indirect method of proof under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Petitioner suggests that even if the court below correctly applied *Price Waterhouse*, that this Court should review the trial record to determine if the court below erred in its conclusion that the petitioner failed in her burden of proof to establish that the several nondiscriminatory stated reasons for the employment decision were pretextual. In seeking further review of the indirect method of proof, petitioner does not set forth any of the established criteria warranting further consideration by this Court, and simply challenges the finding below that she failed to prove the nondiscriminatory reasons for hiring Walters were mere pretext.

Petitioner simply requests that this Court review the lower court's finding that petitioner failed to introduce proof of pretext as to the several legitimate nondiscriminatory reasons for hiring Walters (petition pp. 17-20). Petitioner does not suggest that the court below misapplied the law or acted inconsistently with any rule or precedent of this Court. Rather, petitioner simply disagrees with the lower court's view of the evidence. Petitioner readily admits that the burden to establish pretext rested with her and seeks review here of the lower court's determination that she had failed in that burden (petition p. 17).

Bruno's petition makes no reference to the evidence in the trial court which was analyzed and discussed by the court below in reaching its decision (appendix pp. 14-17). The petition makes no reference to the uncontroverted evidence that Pyle ranked a male applicant as the most

experienced (appendix p. 15), nor is there mention of the conclusion reached by the court below:

> Even if Pyle had hired the most experienced paramedic, according to objective standards, Bruno would not have been the choice. (Appendix p. 16.)

Bruno does not suggest to this Court that the ranking of the applicants' qualifications was pretextual. She at no time suggested to the lower court or to the trial court, that she was more qualified than the male applicant in first position.

Further, Bruno does not contest or challenge the lower court's application of the burden-shifting method of proof outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1983) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) to the indirect proof method of presenting evidence (appendix p. 13). Rather, petitioner's challenge to the lower court's opinion rests in its finding that she failed to prove the reasons for selecting a male candidate in this case were pretextual. Petitioner's challenge is very fact specific to this case and the evidence introduced at trial, yet the petitioner fails to discuss the evidence reviewed and analyzed by the court below. The opinion of the 7th Circuit Court of Appeals in this case is a reflection of a careful review of the trial court record (appendix pp. 13-17), with admittedly correct application of the law, and petitioner provides this Court with no reason to disturb it.

The opinion from which petitioner seeks review simply found that the petitioner failed in her burden or proof at trial. The decision below is limited to unique matters factually present in this case and does not qualify for review by this Court. No new rule of law, precedent or constitutional principle has been decided.

None of this Court's opinions have been contravened, altered or modified by the court below. In *Price Waterhouse* this Court held that a plaintiff must show that the employer actually relied on her gender in making its decision. 490 U.S. 228 at 251. The opinion appealed from does not hold otherwise.

Similarly, the petitioner's contention that the order appealed from conflicts with other court of appeals' decisions is misplaced as the cases relied upon are factually and legally distinguishable.

The opinion appealed from evidences that the 7th Circuit Court of Appeals carefully reviewed a trial record and applied the appropriate evidentiary, procedural and substantive legal principles to it.

CONCLUSION

For all the foregoing reasons, respondents, City of Crown Point, Indiana and George W. Pyle, Jr., individually and in his capacity as Chief of Crown Point Emergency Medical Service, pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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